IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 136 OF 2005

1. Shri Ganesh Putu Deulkar,
   major, r/o Tisca, Usgao,
   Ponda, Goa,

2. Shri Vassant Putu Deulkar,
   major, r/o Gaumcarvado,
   Usgao, Ponda, Goa,

3. Smt. Tulsi Vassant Deulkar,
   wife of Vassant Deulkar,
   r/o Haumcarvado, Usgao,
   Ponda, Goa, and

4. Shri Vassudeva Putu Deulkar,
   r/o Gaumcarvado, Usgao,
   Ponda, Goa. ... Petitioners

Versus

1. Shri Pundalik Rama Gad, and

2. Smt. Shahtabai Pundalik Gad,
   both majors, r/o Gaumcarvado,
   Usgao, Ponda, Goa. ... Respondents.

Mr M. S. Usgaokar, Senior Advocate with Mr. Sudin Usgaokar, advocate for the petitioners.

Mr. S.D. Lotlikar, Senior Advocate with Ms. S. Naik, advocate for the respondents.

CORAM : S. S. PARKAR, J.

DATE : 8th June, 2005.

ORAL ORDER

Heard learned counsel for the petitioners and the respondents. By this Writ Petition the petitioners/original defendants are impugning the Order dated 13th November, 1998, of the trial Court allowing the amendment of the plaint.

2. The respondents had filed a suit for eviction of the petitioners on the ground that the petitioners had illegally constructed the structure on their land bearing revenue no.492 and for some consequential relief. That suit was decreed and the decree was upheld by the District Court in appeal. In the Second Appeal no.28/96 filed in this Court, this Court had set aside the decree passed by the trial Court as confirmed by the Appellate Court and remanded the matter to the trial Court to decide the same afresh, after hearing the parties. In the penultimate paragraph no.14 this Court had observed as follows:-

> "14. Considering the fact that both the Courts below have decided the matter without considering the main controversy in the matter and having proceeded to decide the matter by adopting wrong approach as regards the analysis of materials, it is necessary to quash and set aside the Judgments and Order of both

> the Courts below and it is necessary to remand the matter to the trial Court to decide the same afresh after hearing the parties and bearing in mind the observations made hereinabove."

In the aforesaid paragraph this Court has observed that both the Courts below had decided the matter without considering the main controversy in the matter and proceeded to decide the matter by adopting wrong approach as regards the analysis of the materials.

3. After the remand the respondents/original plaintiffs applied for amendment of the plaint on 2nd November, 1998, stating that during the pendency of the suit the property which is the subject-matter of the suit had been surveyed, in which the name of the plaintiff no.1 alongwith others has been shown as "occupant". The matter had been remanded because the plaintiffs had claimed that the suit structure is situated in Matriz/Revenue no.492, while the defendants had claimed that suit structure is situated in Revenue no.491 which is their property. By the amendment the plaintiffs wanted to produce the revenue records. The suit structure is situated on the northern side of the road which passes through revenue no. 492. As per the revenue records, after the survey of the suit property, the northern portion

is shown in occupation of the plaintiff no.1 alongwith others, while the southern portion of the road is shown in exclusive occupation of the plaintiffs. The property is given new survey nos.75/2, 75/4 and 74/2. The said amendment is challenged on behalf of the defendants on the following grounds.

4. Three contentions have been raised by the learned counsel for the petitioners. Firstly, it is argued that the amendment was allowed contrary to the remand order. Secondly, it is contended that the amendment changes the nature of the suit and thirdly, it is contended that there is a bar of limitation inasmuch as the suit is of the year 1972.

5. As regards the first point, it is argued that the amendment is allowed contrary to the order which directs the trial Court to decide the issue afresh after hearing the parties. It is trite to say that the Order of the lower courts can be set aside and substituted or varied by the Appellate Courts on the basis of material on record. The fact that the case was remanded to the trial Court after setting aside the impugned Orders would necessarily mean that the parties can be allowed to lead further evidence in the matter as regards the main issue which is about

the ownership of the land in question. This Court had remanded the matter to the trial Court to decide the issue afresh after hearing the parties. In my view hearing the parties would also include the right to lead further evidence, if required, because otherwise on the basis of the existing record or material, nothing would have prevented this Court from deciding the issue involved in the case.

6. Secondly, it is urged that the amendment would change the nature of the suit. I do not think so. The suit was filed for eviction of the defendants on the ground that they had illegally constructed the structure on the plot of land belonging to the plaintiffs and were in wrongful occupation thereof. The nature of that suit will not change by allowing the amendment as sought for. The revenue records are stated to have been prepared after filing the suit as the survey of the land in question was completed after the institution of the suit. What the plaintiffs want by way of amendment is to lead evidence with regard to the main issue, i.e. the ownership of the suit land, and not to introduce or raise a new plea.

7. Thirdly, it was argued on behalf of the appellants that there is a bar of limitation as the suit was of the

year 1972 and the amendment was sought in the year 1998, after remand. Since the nature of the suit is not changed by allowing the amendment sought on behalf of the plaintiffs, there is no question of bar of limitation.

8. The judgments relied on behalf of the petitioners in the case of ***Mohammad Jaffer Ali vs. S. Rajeswara Rao & Ors.,*** (AIR 1971 A.P. 156) and in the case of ***Mohan Lal vs. Anandibai & Ors.,*** (AIR 1971 SC 2177), are not applicable to this case. Reliance placed on paragraph 31 of the judgment in the case of ***Mohammad Jaffer Ali vs. S. Rajeswara Rao & Ors.*** (surpa), is absolutely irrelevant. So far as the judgment of the Apex court in the case of ***Mohan Lal vs. Anandibai & Ors.,*** (supra) is concerned, what the Supreme Court has held is that an appellant cannot be allowed to raise any new pleas if they are not raised at the initial stage. That was a case where the remand order was passed allowing the party to amend the pleadings for specific purpose and when that party wanted to introduce new pleas by amendment, the Supreme Court had disallowed the same. In this case, the amendment sought is necessary for deciding the main issue, i.e. the ownership of the suit land for the purpose of which this Court

had remanded the matter.

9. For the aforesaid reasons, I find no substance in this Writ Petition and therefore reject the same with costs.

S. S. PARKAR, J.

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